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Human Rights Committee

Communication No. 1889/2009

Views adopted by the Committee at its 110th session (10 to 28 March 2014)

Submitted by:	Khaoukha Marouf (represented by Track Impunity Always (TRIAL))
Alleged victims:	Abdelkrim Azizi (the author's husband), Abdessamad Azizi (the author's son) and the author herself
State party:	Algeria
Date of communication:	30 January 2009 (initial submission)
Document reference:	Special Rapporteur's rule 97 decision, transmitted to the State party on 3 August 2009 (not issued in document form)
Date of adoption of Views:	21 March 2014
Subject matter:	Enforced disappearance
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Right to life, prohibition of torture and cruel or inhuman treatment, right to liberty and security of person, respect for the inherent dignity of the human person, recognition as a person before the law, right to an effective remedy, right to privacy and right to protection of family life
Articles of the Covenant:	Articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1)
Article of the Optional Protocol:	Article 5 (para. 2 (b))

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Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (110th session)

concerning

Communication No. 1889/2009*

Submitted by:	Khaoukha Marouf (represented by Track Impunity Always (TRIAL))
Alleged victims:	Abdelkrim Azizi (the author's husband), Abdessamad Azizi (the author's son) and the author herself
State party:	Algeria
Date of communication:	30 January 2009 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 21 March 2014,

Having concluded its consideration of communication No. 1889/2009, submitted to the Human Rights Committee by Khaoukha Marouf under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1.1 The author of the communication, which is dated 30 January 2009 and 28 April 2009, is Khaoukha Marouf, an Algerian national born on 8 March 1943. She claims that her husband, Abdelkrim Azizi, born on 25 March 1941, and her son, Abdessamad Azizi, born on 20 August 1976, were the victims of violations by the State party of articles 2 (para. 3), 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1), of the Covenant. She also

* The following members of the Committee took part in the consideration of the present communication: Mr. Yadh Ben Achour, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Mr. Walter Kälin, Ms. Zonke Zanele Majodina, Mr. Gerald L. Neuman, Mr. Victor Manuel Rodríguez-Rescia, Mr. Fabián Omar Salvioli, Mr. Konstantine Vardzelashvili, Ms. Margo Waterval and Mr. Andrei Paul Zlătescu. In accordance with article 90 of the Committee's rules of procedure, Mr. Lazhari Bouzid, member of the Committee, did not take part in the consideration of the communication.

The text of a joint opinion by Committee members Mr. Salvioli and Mr. Rodríguez-Rescia (concurring) is appended to the present Views.

claims that she herself is the victim of violations by the State party of articles 2 (para. 3), 7, 17 and 23 (para. 1), of the Covenant. She is represented by the organization Track Impunity Always (TRIAL).

1.2 On 19 October 2009, the Committee, through the Special Rapporteur on new communications and interim measures, decided not to consider the admissibility and the merits of the communication separately.

The facts as submitted by the author

2.1 On 22 September 1994, during the night, uniformed police officers who were part of the fifth mobile criminal investigation brigade of the Cité de la Montagne police station in Bourouba broke down the front door of the author's home. When her husband, Abdelkrim Azizi, asked who they were and what they wanted, they insulted and shoved him. They then blindfolded him and took him into the bathroom. While the author and her three daughters were kept in the living room, one of the author's sons, Abdessamad Azizi, then 18 years of age, was led away from the family apartment by the police and has not been seen since. A police officer then took the eldest and then the youngest of the sisters into another room and asked them questions about their family and about their father's activities, while slapping and kicking them. They were then taken into the bathroom, where their father was tortured using the "rag technique".[1] The police officers also tried to rip off Abdelkrim Azizi's beard after dousing it with strong glue. The two sisters in turn saw their father lying on the ground, covered in blood, in a pool of water. The police then went down to the family's storeroom and seized jewellery, money, foodstuffs and identity papers. After threatening to burn down the author's home if she told anyone what had happened that night, the police officers left, taking Abdelkrim Azizi with them. The family has not seen the author's husband or son since then. Following these events, the family's home was searched several times. During these searches, the police officers seized jewellery, money, valuables and food.

2.2 Since the arrests of Abdelkrim and Abdessamad Azizi, the Azizi family has made unceasing attempts to locate the victims. On 23 September 1994, the morning after their arrest, the author went to the Cité de la Montagne police station in Bourouba, where she recognized the police officers who had come to her home the night before. The police officers threatened her but denied having arrested her son and her husband. Despite repeated visits to the police station in Bourouba, the Algiers central police station, El Harrach prison and Serkadji prison, the author was not able to obtain any official information about the fate of her husband or her son. The author has also written several times to the public prosecutor of the Court of El Harrach. As she did not receive any reply, she then wrote to the chief prosecutor of the Court of Algiers, to no effect. The author also made enquiries through a lawyer with the Court of El Harrach, also without success. In December 1996, the author contacted the Algerian League for the Defence of Human Rights and the National Observatory for Human Rights, again with no result.

2.3 On 12 December 1997, the author submitted the case to the United Nations Working Group on Enforced or Involuntary Disappearances. The State party did not reply to the Working Group's requests for information.

2.4 According to testimony from the former deputy brigade chief of the Cité de la Montagne police station in Bourouba, Mr. Mohamed Rebai, as published[2] in an open letter

[1] The rag technique consists of forcing the victim to swallow large quantities of dirty water or chemicals through a rag forced into the victim's mouth with the aim of causing suffocation or loss of consciousness.

[2] Available at: http://www.algeria-watch.org/farticle/justice/taiwanlettre.htm.

dated 1 July 2000 and annexed to the author's communication, the two victims had been at the police station but no specific charges had been brought against them. Mr. Rebai also alleges that the two victims were killed under torture by police commissioner Boualem. Several persons who had been detained at the police station and subsequently released have claimed that they saw the victims there. Abdelkrim Azizi also reportedly passed through the Ain-Nadja military hospital on an unknown date before being brought to Bourouba.

2.5 With regard to the exhaustion of domestic remedies, the author stresses that all her efforts and those of her family members have been to no avail. Despite her submission, the competent prosecutor never followed up on her complaint and the chief prosecutor did not initiate a judicial inquiry. The author claims that she also sent letters on several occasions to the authorities, including the Ombudsman, asking them to open an investigation. The Ombudsman replied to the author on 10 and 13 January 1998, and then on 4 May 1998, acknowledging receipt of her requests for intervention and informing her that he had referred the case to the competent bodies for examination. Since then, he has not provided any information about the follow-up given to his request to the "competent bodies". The authorities have not contacted the author since then. Moreover, she has not received any reply to the letters she sent to the National Observatory for Human Rights, the local public prosecutor of the court of El Harrach or the chief prosecutor of the Algiers Court of Appeal. None of these bodies has contacted the author to inform her that an investigation has been opened. Thus, despite the fact that the members of the Azizi family have appealed to several institutions and national authorities that are in a position to help them, each time they have met with inaction on their part. Not only did the police officers and military personnel who were contacted deny the facts and fail to provide the author with information, they also mocked and threatened her.

2.6 In addition, the author claims that the measures she has taken have been restricted by her fear of further reprisals at the hands of the police and the justice system, considering that one of her sons, Lakhdar Azizi, was detained since 1993 in Berrouaghia prison after having been sentenced to 10 years' imprisonment; the husband of one of her daughters, Kamel Rakik, disappeared after being arrested by security forces on 6 May 1996; her other daughter's husband, Ali Aouis, was also arrested and tortured in May 1996; and the author and her three daughters and young son, then 12 years of age, were arrested and held in unspeakable conditions for 5 weeks in May 1996.

2.7 In the alternative, the author maintains that she no longer has the legal right to bring judicial proceedings since the promulgation on 27 February 2006 of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation.[3] Such a remedy would even have been dangerous for the author. Not only did all the remedies attempted prove ineffective, they have now also become totally unavailable. The author therefore maintains that she is no longer obliged to keep pursuing her attempts at the domestic level, which

[3] The author notes that article 45 of the Ordinance, promulgated on 27 February 2006, provides that "legal proceedings may not be brought against individuals or groups who are members of any branch of the defence and security forces of the Republic for actions undertaken to protect persons and property, safeguard the nation and preserve the institutions of the People's Democratic Republic of Algeria. Any allegation or complaint shall be declared inadmissible by the competent judicial authority". Article 46 of Ordinance No. 06-01 provides that "anyone who, through his or her spoken or written statements or any other act, uses or makes use of the wounds caused by the national tragedy to undermine the institutions of the People's Democratic Republic of Algeria, weaken the State, impugn the honour of its agents who served it with dignity, or tarnish the image of Algeria abroad shall be liable to a term of imprisonment of 3 to 5 years or a fine of 250,000 to 500,000 Algerian dinars". See also Human Rights Committee, concluding observations on the third periodic report of Algeria, CCPR/C/DZA/CO/3/CRP.1, 1 November 2007, paras. 7 and 8.

would expose her to criminal prosecution, in order to ensure that her communication is admissible before the Committee.

The complaint

3.1 The author considers that her husband and her son have been the victims of enforced disappearance,[4] in violation of articles 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17 and 23 (para. 1) of the Covenant, read alone and in conjunction with article 2 (para. 3) of the Covenant. The author also considers that she herself is the victim of a violation of articles 7, 17 and 23 (para. 1), read alone and in conjunction with article 2 (para. 3) of the Covenant.

3.2 The author argues that her husband, Abdelkrim Azizi, and her son, Abdessamad Azizi, are victims of enforced disappearance, as they were arrested by agents of the State and their arrest was followed by a refusal to acknowledge their deprivation of liberty or to disclose their fate, thereby deliberately removing them from the protection of the law. She points out that, according to numerous sources, for nearly a decade the Algerian security forces carried out a series of massive and systematic arbitrary arrests followed by enforced disappearances of civilians, claiming an estimated 7,000 to 20,000 victims. The chances of finding the author's husband and son alive are minimal, and, even if their disappearance has not resulted in their deaths, the threat to their lives would still constitute a violation of article 6, in conjunction with article 2, paragraph 3, of the Covenant.

3.3 The author recalls that, according to the Committee's jurisprudence, the mere fact of being subjected to enforced disappearance constitutes inhuman or degrading treatment.[5] The anguish and suffering caused by indefinite detention without contact with the family or the outside world constitute treatment in breach of article 7 of the Covenant.[6] In addition, on 22 September 1994, the author's husband was tortured for several hours by police officers in the bathroom of the family home, at times in the presence of two of his daughters. Moreover, the Cité de la Montagne police station in Bourouba, where the victims are thought to have been detained, is known for the systematic torture and abuse practised there, particularly at the time when the events occurred. This suggests that the victims were subjected to treatment that violates article 7 of the Covenant. The author also considers that the disappearance of her husband and her son has been, and continues to be, for herself and for her close relatives, a paralysing, painful and distressing experience, to the extent that the family of the disappeared persons knows nothing of the victims' fate or, if they are in fact dead, of the circumstances of their death and the place where they are buried. In addition, in the author's view, the fact that two of Abdelkrim Azizi's daughters were forced to watch their father being tortured should be regarded as constituting treatment prohibited under article 7 of the Covenant. Watching the torture inflicted on their father could only have exacerbated the mental anguish suffered by the victims' family members, since it showed them the methods used by the police and made the disappearance of Abdelkrim and Abdessamad Azizi all the more unbearable. Referring to the Committee's

[4] The author refers to the definition of "enforced disappearance" given in article 7 (para. 2 (i)) of the Rome Statute of the International Criminal Court and to article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.

[5] Communication No. 449/1991, *Barbarin Mojica v. Dominican Republic*, Views adopted on 15 July 1994.

[6] Communication No. 950/2000, *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Views adopted on 16 July 2003, para. 9.5.

jurisprudence,[7] the author concludes that the State party has also violated her rights under article 7, read alone and in conjunction with article 2, paragraph 3, of the Covenant.

3.4 The author recalls the Committee's settled jurisprudence whereby any unacknowledged detention constitutes a complete negation of the right to liberty and security guaranteed by article 9 of the Covenant and an extremely serious violation of this article.[8] She argues that the victims' arrest without a warrant on 22 September 1994 and the failure to inform them of the reasons for their arrest constitute a violation of article 9, paragraphs 1 and 2, of the Covenant. Moreover, the State party's legislation limits the period of lawful custody to 48 hours generally, 96 hours where the charges concern a risk to State security, and 12 days where terrorist or subversive acts are concerned. Once these time limits have passed, the arrested person must be either brought before a judicial authority or released, which was not done in the case of Abdelkrim and Abdessamad Azizi. As they were held incommunicado, with no possibility of contacting the outside world, the victims were unable to challenge the lawfulness of their detention, or ask a judge to order their release, or even ask a third party to defend them. Therefore, the author submits that the State party has acted in violation of article 9, paragraphs 1 to 4, of the Covenant.

3.5 Since her husband and her son were the victims of a violation of article 7 of the Covenant and they were not treated with humanity or with respect for the inherent dignity of the human person, owing to the fact that they were held incommunicado and suffered ill-treatment, the author claims that they were victims of a violation by the State party of article 10, paragraph 1, of the Covenant.

3.6 Citing the Committee's jurisprudence,[9] the author also claims that, as victims of enforced disappearance, Abdelkrim and Abdessamad Azizi were denied the protection of the law, in violation of article 16 of the Covenant.

3.7 The author argues that the actions of the police officers, by breaking down the door of her home without a warrant, torturing her husband, arresting him and her son, subjecting other members of the family to physical and psychological violence — particularly by forcing the author's daughters to witness their father being tortured — and repeatedly robbing and causing significant damage to the Azizi home over several days, constitute a violation of article 17 of the Covenant.[10]

3.8 The enforced disappearance of her husband and son has destroyed the author's family life. She was left alone with her three daughters and her youngest son, then 10 years of age. The author maintains that the State party has failed in its duty to protect her family and has thus violated article 23, paragraph 1, of the Covenant.[11]

3.9 The author maintains that, since all the steps she took to discover her husband's and her son's fate were fruitless, the State party did not fulfil its obligation to guarantee Abdelkrim and Abdessamad Azizi an effective remedy, since it should have conducted an in-depth and diligent investigation into their disappearance and informed the family of the results of the investigation. The absence of an effective remedy is compounded by the fact that a total and general amnesty was legally declared following the promulgation on 27

[7] Communication No. 107/1981, *Almeida de Quinteros v. Uruguay*, Views adopted on 21 July 1983. See also the Committee's concluding observations on its consideration of the second periodic report of Algeria, CCPR/C/79/Add.95, adopted on 18 August 1998, para. 10 in fine.

[8] Communication No. 612/1995, *Vicente et al. v. Colombia*, Views adopted on 29 July 1997.

[9] Communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on10 July 2007, para. 7.9.

[10] Communication No. 687/1996, *Rojas Garcia v. Colombia*, Views adopted on 3 April 2001, para. 10.3.

[11] Communication No. 962/2001, *Mulezi v. the Democratic Republic of the Congo*, Views adopted on 8 July 2004, para. 5.4.

February 2006 of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation, which prohibits, on pain of imprisonment, the pursuit of legal remedies to shed light on the most serious crimes such as enforced disappearances, guaranteeing impunity to the individuals responsible for violations. This amnesty law is in breach of the State's obligation to investigate serious violations of human rights and of the right of victims to an effective remedy. The author concludes that the State party violated article 2, paragraph 3, of the Covenant with regard to herself, and with regard to her husband and her son.

State party's observations on admissibility

4.1 On 6 October 2010, the State party contested the admissibility of the communication. It is of the view that the communication, which incriminates public officials, or persons acting on behalf of public authorities, in cases of enforced disappearance during the period in question — from 1993 to 1998 — should be considered within the broader context of the sociopolitical situation and should be declared inadmissible. The individual focus in this complaint does not reflect the national sociopolitical and security context in which the alleged events are said to have occurred, and does not reflect reality or the factual diversity of the situations covered by the generic term "enforced disappearance" during the period in question.

4.2 In this respect, and contrary to the theories propounded by international NGOs, which the State party finds to not be very objective, the painful ordeal of terrorism that the State party experienced cannot be seen as a civil war between two opposing camps; rather, it was a crisis that led to the spread of terrorism following calls for civil disobedience. This in turn led to the emergence of a multitude of armed groups engaged in terrorist crimes, acts of subversion, the destruction and sabotage of public infrastructure, and acts of terror targeting the civilian population. In the 1990s, as a result, the State party went through one of the most terrible ordeals of its young life as an independent country. In this context, and in accordance with the Constitution (arts. 87 and 91), precautionary measures were implemented, and the Algerian Government informed the Secretariat of the United Nations of its declaration of a state of emergency, in accordance with article 4, paragraph 3, of the Covenant.

4.3 During this period, terrorist attacks were a daily occurrence in the country; they were carried out by a host of ideologically driven armed groups with little in the way of hierarchy, which severely diminished the ability of the authorities to control the security situation. As a result, there was some confusion in the manner in which a number of operations were carried out among the civilian population, and it was difficult for civilians to distinguish between the actions of terrorist groups and those of the security forces, to whom civilians often attributed enforced disappearances. According to a variety of independent sources, including the press and human rights organizations, the concept of disappearances in Algeria during the period in question covers six possible scenarios, none of which can be blamed on the State. The first scenario cited by the State party concerns persons reported missing by their relatives but who in fact had chosen to go into hiding in order to join an armed group and who instructed their families to report that they had been arrested by the security services, as a way of "covering their tracks" and avoiding being "harassed" by the police. The second scenario concerns persons who were reported missing after their arrest by the security services but who took advantage of their subsequent release to go into hiding. The third scenario concerns persons abducted by armed groups which, because they were not identified or because they had stolen uniforms or identification documents from police officers or soldiers, were mistakenly thought to belong to the armed forces or security services. The fourth scenario concerns persons reported missing who abandoned their families, and sometimes even left the country, to escape from personal problems or family disputes. The fifth scenario concerns persons reported missing by their

family but who were in fact wanted terrorists who had been killed and buried in the maquis following factional infighting, doctrinal disputes or arguments over the spoils of war among rival armed groups. The sixth scenario mentioned by the State party concerns persons reported missing who were actually living in Algeria or abroad under a false identity provided by a network of document forgers.

4.4 The State party maintains that it was in view of the diversity and complexity of the situations covered by the general concept of disappearance that the Algerian legislature, following the referendum on the Charter for Peace and National Reconciliation, recommended a comprehensive approach to the issue of disappeared persons, whereby all persons who had disappeared in the context of the "national tragedy" would be cared for, all victims would be offered support to overcome their ordeal and all victims of disappearance and their beneficiaries would be entitled to redress. According to statistics from the Ministry of the Interior, 8,023 cases of disappearance have been reported, 6,774 examined, 5,704 approved for compensation and 934 rejected, with 136 still pending. A total of 371,459,390 Algerian dinars (DA) has been paid out as compensation to all the victims concerned. In addition, a total of DA 1,320,824,683 has been paid out in monthly pensions.

4.5 The State party further argues that not all domestic remedies have been exhausted. It stresses the importance of distinguishing between simple formalities involving the political or administrative authorities, non-judicial remedies pursued through advisory or mediation bodies, and judicial remedies pursued through the relevant courts of justice. The State party observes that, as may be seen from the authors' statements, the complainants have written letters to political and administrative authorities, petitioned advisory or mediation bodies and petitioned representatives of the prosecution service (chief prosecutors and public prosecutors), but have not, strictly speaking, initiated legal action and seen it through to its conclusion by availing themselves of all available remedies of appeal and judicial review. Of all these authorities, only the representatives of the prosecution service are authorized by law to open a preliminary inquiry and refer a case to the investigating judge. In the Algerian legal system, it is the public prosecutor who receives complaints and who, if warranted, institutes criminal proceedings. Nevertheless, in order to protect the rights of victims or their beneficiaries, the Code of Criminal Procedure authorizes the latter to sue for damages by filing a complaint with the investigating judge. In this case, it is the victim, not the prosecutor, who initiates criminal proceedings by bringing the matter before the investigating judge. This remedy, which is provided for in articles 72 and 73 of the Code of Criminal Procedure, was not utilized, despite the fact that it would have enabled the victims to institute criminal proceedings and compel the investigating judge to initiate proceedings, even if the prosecution service had decided otherwise.

4.6 The State party also notes the authors' contention that it is impossible to consider that any effective and available domestic remedies exist in Algeria to which the families of victims of disappearance could have recourse, on account of the adoption by referendum of the Charter for Peace and National Reconciliation and its implementing legislation – in particular, article 45 of Ordinance No. 06-01. On this basis, the authors believed they did not need to bring the matter before the relevant courts, in view of the latter's likely position and findings regarding the application of the Ordinance. However, the authors cannot invoke this Ordinance and its implementing legislation as a pretext for failing to institute the legal proceedings available to them. The State party recalls the Committee's jurisprudence to the effect that a person's subjective belief in, or presumption of, the futility

of a remedy does not exempt that person from the requirement to exhaust all domestic remedies.[12]

4.7 The State party then turns its attention to the nature, principles and content of the Charter for Peace and National Reconciliation and its implementing legislation. It maintains that, in accordance with the principle of the inalienability of peace, which has become an international right to peace, the Committee should support and consolidate peace and encourage national reconciliation with a view to strengthening States affected by domestic crises. As part of this effort to achieve national reconciliation, the State party adopted the Charter, and its implementing Ordinance prescribes legal measures for the discontinuance of criminal proceedings and the commutation or remission of sentences for any person who is found guilty of acts of terrorism or who benefits from the provisions of the legislation on civil dissent, except for persons who have committed or been accomplices in mass killings, rapes or bombings in public places. This ordinance also introduces a procedure for filing an official finding of presumed death, which entitles beneficiaries to receive compensation as victims of the "national tragedy". Social and economic measures have also been put in place, including the provision of employment placement assistance and compensation for all persons considered victims of the "national tragedy". Finally, the Ordinance prescribes political measures, such as a ban on holding political office for any person who exploited religion in the past in a way that contributed to the "national tragedy", and establishes the inadmissibility of any proceedings brought against individuals or groups who are members of any branch of Algeria's defence and security forces for actions undertaken to protect persons and property, safeguard the nation and preserve its institutions.

4.8 In addition to the establishment of the fund to compensate all victims of the "national tragedy", the sovereign people of Algeria have, according to the State party, agreed to a process of national reconciliation to heal the wounds inflicted. The State party insists that the proclamation of the Charter for Peace and National Reconciliation reflects a desire to avoid confrontation in the courts, media outpourings and political score settling. The State party is therefore of the view that the authors' allegations are covered by the comprehensive domestic settlement mechanism provided for in the Charter.

4.9 The State party asks the Committee to note how similar the facts and situations described by the author are and to take into account the sociopolitical and security context in which they occurred; to find that the author failed to exhaust all domestic remedies; to recognize that the authorities of the State party have established a comprehensive domestic mechanism for processing and settling the cases referred to in these communications through measures aimed at achieving peace and national reconciliation that are consistent with the principles of the Charter of the United Nations and subsequent covenants and conventions; to find the communication inadmissible; and to request that the author seek an alternative remedy.

Author's comments on the State party's submission

5.1 In her comments dated 13 May 2011, the author considers that the State party's adoption of domestic legislative and administrative measures to support the victims of the "national tragedy" cannot be invoked at the admissibility stage to prohibit individuals subject to its jurisdiction from using the procedure provided for under the Optional Protocol. In the case in point, the legislative measures adopted in themselves amount to a

[12] The State party cites in particular communications Nos. 210/1986 and 225/1987, *Pratt and Morgan v. Jamaica*, Views adopted on 6 April 1989.

violation of the rights enshrined in the Covenant, as the Committee has previously observed.[13]

5.2 The author recalls that the declaration of a state of emergency made by Algeria on 9 February 1992 does not affect people's right to submit individual communications to the Committee. The author therefore considers that the State party's observations on the appropriateness of the communication do not constitute a ground for inadmissibility.

5.3 The author also refers to the State party's argument that the requirement to exhaust domestic remedies calls on the author to institute criminal proceedings by filing a complaint with the investigating judge, in accordance with articles 72 et seq. of the Code of Criminal Procedure. She refers to the Committee's jurisprudence[14] and considers that, given the serious nature of the alleged offences, the fact that the family did not sue for damages cannot be invoked as a means to palliate the lack of the criminal proceedings that should have been initiated by the State party on its own initiative. Therefore, suing for damages in such cases is not a prerequisite for satisfying the requirement of exhaustion of domestic remedies. Clearly, domestic remedies have proved totally ineffective. Both the judicial and the government authorities were informed of the arrest of Abdessamad and Abdelkrim Azizi, but the motives for their arrest, as well as their current whereabouts, remain unknown. No investigation was ordered, no inquiry was launched, and none of the police officers involved — who could have been easily identified — were called to account. The State party has not fulfilled its duty to investigate and establish the facts about all serious violations of human rights.

5.4 As to the State party's argument that mere "subjective belief or presumption" does not exempt the author of a communication from the requirement to exhaust all domestic remedies, the author cites the Committee's established jurisprudence, which stipulates that, in order to satisfy the requirements set out in article 5 of the Optional Protocol to the Covenant, the remedies must be effective, useful and available and must offer the author of the communication a reasonable prospect of redress.[15] The author also refers to article 45 of Ordinance No. 06-01, which provides that no legal proceedings can be brought against individuals or groups who are members of the defence or security forces. Any person making such a complaint or allegation is liable to a term of imprisonment of 3 to 5 years or a fine of DA 250,000 to DA 500,000. Citing the Human Rights Committee, the author also points out that Ordinance No. 06-01 promotes impunity, infringes the right to an effective remedy and is not compatible with the Covenant.[16] The author considers that the State party has therefore not convincingly demonstrated how suing for damages would have enabled the competent courts to receive and investigate complaints, since this would involve violating article 45 of the Ordinance, nor how the author could have been guaranteed immunity from prosecution under article 46 of the Ordinance. Based on a reading of these provisions, the author concludes that any complaint regarding the violations suffered by the author, her husband and her son would be not only declared inadmissible, but also treated as a criminal offence. The author notes that the State party fails to provide an example of any case which, despite the existence of the above-mentioned Ordinance, has led to the

[13] CCPR/C/DZA/CO/3, paras. 7, 8 and 13; communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010, para. 9.2; communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para. 11; and the concluding observations of the Committee against Torture on the third periodic report of Algeria, CAT/C/DZA/CO/3, adopted on 13 May 2008, paras. 11, 13 and 17.

[14] *Benaziza v. Algeria*, para. 8.3.

[15] Communication No. 437/1990, *Colamarco Patiño v. Panama*, decision adopted on 21 October 1994, para. 5.2.

[16] CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

effective prosecution of the perpetrators of human rights violations in a similar case. The author concludes that the remedies mentioned by the State party are futile.

5.5 With regard to the merits of the communication, the author notes that the State party has simply listed the general scenarios in which the victims of the "national tragedy" might have disappeared. Such general observations do not dispute the allegations made in the present communication. Furthermore, the comments are listed in the same way as in a number of other cases, thus demonstrating the State party's continuing unwillingness to consider such cases individually and to accept responsibility, in respect of the author of this communication, for the suffering that she and her family have endured.

5.6 The author asks that the Committee consider her claims to be sufficiently substantiated, given that she is unable to provide additional information in support of her communication, as only the State party holds precise information about the victims' fate.

5.7 The author considers that the absence of a response on the merits of the communication constitutes a tacit acknowledgement of the accuracy of the facts alleged. The State party's silence constitutes a recognition of failure in its duty to carry out an investigation into the case of enforced disappearance brought to its attention, as otherwise it would have been in a position to provide a detailed response based on the results of the investigations that it should have conducted. With regard to the merits, the author maintains all the allegations set out in her initial communication.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Firstly, the Committee recalls that the decision by the Special Rapporteur to examine the admissibility and the merits jointly (see paragraph 1.2) does not preclude their being considered separately by the Committee. The joinder of admissibility and the merits does not mean they must be examined simultaneously. Consequently, before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 Under article 5, paragraph 2 (a), of the Optional Protocol, the Committee must ascertain that the same matter is not being examined under another procedure of international investigation or settlement. The Committee notes that the disappearances of Abdelkrim and Abdessamad Azizi were reported to the Working Group on Enforced or Involuntary Disappearances. However, it recalls that the extra-conventional procedures or mechanisms established by the Commission on Human Rights or the Human Rights Council, whose mandates are to examine and report publicly on human rights situations in specific countries or territories or on cases of widespread human rights violations worldwide, do not generally constitute an international procedure of investigation or settlement within the meaning of article 5, paragraph 2 (a), of the Optional Protocol.[17] Accordingly, the Committee considers that the examination of Abdelkrim and Abdessamad Azizi's case by the Working Group on Enforced or Involuntary Disappearances does not render the present communication inadmissible under this provision.

6.3 The Committee notes that, in the State party's view, the author has not exhausted domestic remedies since she did not consider the possibility of bringing the matter before the investigating judge and suing for damages in criminal proceedings under articles 72 and 73 of the Code of Criminal Procedure. The Committee also notes that, according to the

[17] Communication No. 1874/2009, *Mihoubi v. Algeria*, Views adopted on 18 October 2013, para. 6.2.

State party, the author has simply written letters to political and administrative authorities and petitioned advisory or mediation bodies and representatives of the prosecution service and that she has not, strictly speaking, initiated legal action and seen it through to its conclusion by availing herself of all available remedies of appeal. The Committee notes in this respect the author's claim that the very next day after Abdelkrim and Abdessamad Azizi's arrest she made enquiries at the Cité de la Montagne police station in Bourouba, at the Algiers central police station, at El Harrach prison and at Serkadji prison, without success. According to the author's account, she also made enquiries with the prosecutor of the Court of El Harrach and the chief prosecutor of the Court of Algiers, and submitted many petitions to representatives of the Government of the State party — including some submitted through a lawyer — and then to the Algerian League for the Defence of Human Rights and to the National Observatory for Human Rights, without success. Only the Ombudsman sent her a reply acknowledging receipt of her claims. None of these actions resulted in effective investigations or the prosecution and conviction of those responsible.

6.4 The Committee recalls that the State party has a duty not only to conduct thorough investigations of alleged violations of human rights brought to the attention of its authorities, including in particular enforced disappearances and violations of the right to life, but also to prosecute, try and punish any person assumed to be responsible for such violations.[18] Although the author repeatedly contacted the competent authorities about the disappearance of her husband and her son, the State party failed to conduct a thorough or in-depth investigation into the disappearance of Abdelkrim and Abdessamad Azizi, despite the fact that serious allegations of enforced disappearance were involved. The State party has also failed to provide sufficient evidence that an effective remedy is actually available, since Ordinance No. 06-01 of 27 February 2006 continues to be applicable despite the Committee's recommendations that it should be brought into line with the Covenant.[19] Moreover, given the vague wording of articles 45 and 46 of the Ordinance, and in the absence of satisfactory information from the State party about their interpretation and actual enforcement, the author's fears about the effectiveness of filing a complaint are reasonable. The Committee recalls that, for a communication to be deemed admissible, the authors must have exhausted only the remedies effective against the alleged violation. In addition, recalling its jurisprudence, the Committee reiterates that to sue for damages for offences as serious as those alleged in the present case cannot be considered a substitute for the charges that should have been brought by the public prosecutor.[20] The Committee therefore concludes that article 5, paragraph 2 (b), of the Optional Protocol is not an obstacle to the admissibility of the communication.

6.5 The Committee considers that the author has sufficiently substantiated her claims insofar as they raise issues under articles 6 (para. 1), 7, 9 (paras. 1–4), 10 (para. 1), 16, 17, 23 (para. 1) and 2 (para. 3) of the Covenant, and therefore proceeds to consider the communication on the merits.

Consideration of the merits

7.1 The Human Rights Committee has considered the communication in the light of all the information made available to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

[18] Communication No. 1884/2009, *Aouali et al. v. Algeria*, Views adopted on18 October 2013, para. 6.4.

[19] CCPR/C/DZA/CO/3, paras. 7, 8 and 13.

[20] *Aouali et al. v. Algeria*, para. 6.4.

7.2 In the communication, the State party has provided general and collective comments on the serious allegations made by the author, and has been content to argue that communications incriminating public officials or persons acting on behalf of public authorities in cases of enforced disappearance between 1993 and 1998 should be looked at in the broader context of the domestic sociopolitical and security environment that prevailed during a period in which the Government had to deal with terrorism. The Committee observes that the Covenant demands that the State party concern itself with the fate of every individual, and treat every individual with respect for the dignity that inheres in every human being. In addition, the Committee recalls its jurisprudence,[21] according to which the State party may not invoke the provisions of the Charter for Peace and National Reconciliation against persons who invoke provisions of the Covenant or who have submitted or may submit communications to the Committee. Without the amendments recommended by the Committee, Ordinance No. 06-01 appears to promote impunity and therefore cannot, as it currently stands, be considered compatible with the Covenant.[22]

7.3 The Committee notes that the State party has not replied to the author's claims concerning the merits of the case, and recalls its jurisprudence,[23] according to which the burden of proof should not rest solely on the author of a communication, especially given that authors and the State party do not always have the same degree of access to evidence and that often only the State party is in possession of the necessary information. It is implicit in article 4, paragraph 2, of the Optional Protocol that the State party has a duty to investigate in good faith all allegations of violations of the Covenant made against it and its representatives and to provide the Committee with whatever information is available to it.[24] In the absence of any explanations from the State party in this respect, due weight must be given to the author's allegations, provided they have been sufficiently substantiated.

7.4 The Committee notes that, according to the author, her husband and son have been missing since their arrest on 22 September 1994 and that the authorities have not only never admitted arresting them but have also failed to conduct any effective investigation that might shed light on their fate. It notes that, according to the author, the chances of finding Abdelkrim and Abdessamad Azizi alive are minimal, and that their prolonged absence and the testimony of the former deputy brigade chief of the Cité de la Montagne police station in Bourouba suggest that they have died while in detention; that incommunicado detention creates a high risk of violation of the right to life, since victims are at the mercy of their jailers who, by the very nature of the circumstances, are subject to no oversight. The Committee recalls that, in cases of enforced disappearance, the deprivation of liberty, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person, removes the person from the protection of the law and places his or her life at serious and constant risk, for which the State is accountable. In the case at hand, the Committee notes that the State party has produced no evidence to indicate that it has fulfilled its obligation to protect the lives of Abdelkrim and Abdessamad Azizi. Therefore the Committee concludes that the State party has failed in its duty to protect the lives of Abdelkrim and Abdessamad Azizi, in violation of article 6 of the Covenant.[25]

7.5 The Committee recognizes the degree of suffering involved in being held indefinitely without contact with the outside world. It recalls its general comment No. 20

[21] *Aouali et al. v. Algeria*, para. 7.2.
[22] CCPR/C/DZA/CO/3, para. 7 (a).
[23] *Aouali et al. v. Algeria*, para. 7.3.
[24] Communication No. 1297/2004, *Medjnoune v. Algeria*, 14 July 2006, para. 8.3.
[25] *Aouali et al. v. Algeria*, para. 7.4.

(1992) on article 7,[26] which recommends that States parties should make provision against incommunicado detention. The Committee notes that, according to the author, Abdelkrim and Abdessamad Azizi were arrested by police officers from the Cité de la Montagne police station in Bourouba on 22 September 1994 in El Harrach (Algiers), at the Azizi family home. They were allegedly also subjected to torture at the Cité de la Montagne police station in Bourouba, according to some of their fellow detainees who were subsequently released and according to former police officer Rebai. Abdelkrim Azizi was also allegedly tortured by police officers in the bathroom of the family home, according to testimony from members of his family. In the absence of a satisfactory explanation from the State party, the Committee finds a violation of article 7 of the Covenant in respect of Abdelkrim and Abdessamad Azizi.[27]

7.6 The Committee also takes note of the anguish and distress that the disappearance of Abdelkrim and Abdessamad Azizi has caused to their wife and mother, the author. It also notes that the police officers forced two of the author's daughters to watch as the police officers tortured Abdelkrim Azizi, and that the police officers made repeated visits to the author's home, which they robbed and vandalized. The Committee notes that the State party has not refuted these allegations. The Committee also considered that the prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim.[28]

7.7 The Committee notes that, in this case, it was the authorities of the State party who robbed and vandalized the family home and store-room on the night of and days following the arrest of Abdelkrim and Abdessamad Azizi; that these acts of destruction were ordered without a warrant; and that the author and her family looked on helplessly as their husband and father were tortured and as their home and store-room were robbed and vandalized. Under the circumstances, the Committee considers that these acts amount to reprisals and intimidation causing intense mental suffering for the author and her family. The Committee finds a separate violation of article 7 of the Covenant with respect to Abdelkrim and Abdessamad Azizi and the author.[29]

7.8 With regard to the alleged violation of article 9, the Committee takes note of the author's allegations, to the effect that Abdelkrim and Abdessamad Azizi were arrested by the police on 22 September 1994 without any explanation, and that following their arrest they were detained at the Cité de la Montagne police station in Bourouba. The authorities of the State party have not at any point provided the family with information about the fate of Abdelkrim and Abdessamad Azizi. The latter were not charged and were not brought before a judicial authority, which would have enabled them to challenge the lawfulness of their detention; moreover, no official information was given to the author or her family about the whereabouts of their detention or their fate. In the absence of satisfactory explanations from the State party, the Committee finds a violation of article 9 with respect to Abdelkrim and Abdessamad Azizi.[30]

7.9 With regard to the complaint under article 10, paragraph 1, the Committee reiterates that persons deprived of their liberty may not be subjected to any hardship or constraint

[26] *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 40* (A/47/40), annex VI, sect. A.

[27] Communication No. 1295/2004, *El Alwani v. The Libyan Arab Jamahiriya*, Views adopted on 11 July 2007, para. 6.5; and communication No. 1422/2005, *El Hassy v. The Libyan Arab Jamahiriya*, Views adopted on 24 October 2007, para. 6.2.

[28] *Aouali et al. v. Algeria*, para. 7.7.

[29] *Aouali et al. v. Algeria*, para. 7.8.

[30] Communications No. 1905/2009, *Khirani v. Algeria*, Views adopted on 26 March 2012, para. 7.7 and No. 1781/2008, *Berzig v. Algeria*, Views adopted on 31 October 2011, para. 8.7.

other than that resulting from the deprivation of liberty and that they must be treated with humanity and respect for their dignity. In view of their incommunicado detention and in the absence of information provided by the State party in that regard, the Committee finds a violation of article 10, paragraph 1, of the Covenant with respect to Abdelkrim and Abdessamad Azizi.[31]

7.10 With regard to the alleged violation of article 16, the Committee reiterates its established jurisprudence, according to which the intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (art. 2, para. 3 of the Covenant), have been systematically impeded.[32] In the present case, the Committee notes that the authorities of the State party have not provided any information to the family about the fate or whereabouts of Abdelkrim and Abdessamad Azizi since their arrest, despite the many requests to various authorities of the State party. The Committee concludes that Abdelkrim and Abdessamad Azizi's enforced disappearance since 22 September 1994 denied them the protection of the law and deprived them of their right to recognition as persons before the law, in violation of article 16 of the Covenant.

7.11 With regard to the alleged violation of article 17 of the Covenant, the Committee notes the author's claim, which the State party has not refuted, that police officers from the Cité de la Montagne police station in Bourouba searched the Azizi family home and store-room without a warrant, causing damage, and seized jewellery, money, foodstuffs and identity papers. The Committee concludes that the entry of State officials into the Azizi home and store-room in such circumstances constitutes unlawful interference in the privacy, family and home of Abdelkrim and Abdessamad Azizi, in violation of article 17 of the Covenant in respect of Abdelkrim and Abdessamad Azizi and the author.[33]

7.12 In light of the above, the Committee will not consider the claims based on the violation of article 23, paragraph 1, of the Covenant separately.

7.13 The author invokes article 2, paragraph 3, of the Covenant, which imposes on States parties the obligation to ensure an effective remedy for all persons whose Covenant rights have been violated. The Committee attaches importance to the establishment by States parties of appropriate judicial and administrative mechanisms for addressing claims of rights violations. It refers to its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant,[34] according to which the failure by a State party to investigate allegations of violations could in itself give rise to a separate breach of the Covenant. In the present case, although the victim's family repeatedly contacted the competent authorities regarding the disappearance of Abdelkrim and Abdessamad Azizi, including judicial authorities such as the prosecutor of Algiers and the prosecutor of El Harrach, all their efforts proved futile and the State party failed to conduct a thorough and effective investigation into the disappearance of Abdelkrim and Abdessamad Azizi, even though the latter had been arrested by State officials. Furthermore, the absence of the legal right to undertake judicial proceedings since the promulgation of Ordinance No. 06-01 implementing the Charter for Peace and National Reconciliation

[31] See general comment No. 21 [44] on art. 10, para. 3, and, inter alia, communication No. 1780/2008, *Zarzi v. Algeria*, Views adopted on 22 March 2011, para. 7.8.

[32] Communication No. 1905/2009, supra, note 29, para. 7.8.

[33] Communication No. 1884/2009, *Faraoun v. Algeria*, 18 October 2013, para. 7.12.

[34] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 40* (A/59/40 (vol. I)), annex III.

continues to deprive Abdelkrim and Abdessamad Azizi and their family of any access to an effective remedy, since the Ordinance prohibits the initiation of legal proceedings to shed light on the most serious crimes, such as enforced disappearances.[35] In the light of the foregoing, the Committee concludes that the facts before it reveal a violation of article 2 (para. 3), read in conjunction with articles 6, 7, 9, 10, 16 and 17 of the Covenant, with respect to Abdelkrim and Abdessamad Azizi, and of article 2 (para. 3), read in conjunction with articles 7 and 17 of the Covenant with respect to the author.

8. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it discloses a violation by the State party of articles 6, 7, 9, 10, 16 and 17, and of article 2 (para. 3) read in conjunction with articles 6, 7, 9, 10, 16 and 17 of the Covenant with respect to Abdelkrim and Abdessamad Azizi. The Committee also finds a violation of articles 7 and 17 and of article 2 (para. 3) read in conjunction with articles 7 and 17 of the Covenant with respect to the author.

9. In accordance with article 2, paragraph 3, of the Covenant, the State party is under an obligation to provide the family of Abdelkrim and Abdessamad Azizi with an effective remedy, including by: (a) conducting a thorough and effective investigation into the disappearance of Abdelkrim and Abdessamad Azizi; (b) providing their family with detailed information about the results of its investigation; (c) releasing them immediately if they are still being detained incommunicado; (d) in the event that Abdelkrim and Abdessamad Azizi are deceased, handing over their remains to their family; (e) prosecuting, trying and punishing those responsible for the violations committed; and (f) providing adequate compensation to the author for the violations suffered and to Abdelkrim and Abdessamad Azizi, if they are still alive. Notwithstanding the terms of Ordinance No. 06-01, the State party should ensure that it does not impede enjoyment of the right to an effective remedy for the victims of crimes such as torture, extrajudicial killings and enforced disappearances. The State party is also under an obligation to take measures to prevent similar violations in the future.

10. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

[Adopted in English, French and Spanish, the French text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[35] CCPR/C/DZA/CO/3, para. 7.

Appendix

Joint opinion of Committee members Mr. Fabián Omar Salvioli and Mr. Victor Manuel Rodríguez-Rescia (concurring)

1. We share the opinion of the Committee and the conclusions that it has reached in *Marouf v. Algeria* (communication No. 1889/2009). Consistent with what we have stated on several previous occasions in similar cases,[36] we consider that, in the present instance, the Committee should have indicated that, by adopting Ordinance No. 06-01, certain provisions of which — in particular article 46 — are clearly incompatible with the Covenant, the State has failed to comply with the general obligation set forth in article 2, paragraph 2, of the Covenant. The Committee should also have found a violation of article 2, paragraph 2, read in conjunction with other substantive provisions of the Covenant. With regard to redress, we consider that the Committee should have recommended that the State bring Ordinance No. 06-01 into line with the Covenant.

2. For the sake of brevity, we refer the reader to the arguments put forward in our joint opinion concerning *Mihoubi v. Algeria* (communication No. 1874/2009).

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

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[36] See, for example, our joint opinion in *Mihoubi v. Algeria*, communication No. 1874/2009.